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Public Prosecutor v WRP Asia Pacific Sdn Bhd

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42LB-60–09 OF 2014
ZULKIFLI BAKAR J
21 JUNE 2016

C *Criminal Law — Offences — Dishonesty offences — Respondent charged for offence of dishonestly preventing actaris meter from duly recording consumption of electricity under s 37(3)(e) of the Electricity Supply Act 1990 — Respondent acquitted and discharged — Appellant appealed against decision — Whether prima facie case established against respondent — Whether appellant acted in good*
D *faith in prosecuting respondent — Whether adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against appellant — Electricity Supply Act 1990 s 37(3)(e) — Evidence Act 1950 s 114(g)*

The respondent was charged at the sessions court for the offence of dishonestly
E preventing the actaris meter from duly recording the consumption of electricity (meter tempering) under s 37(3)(e) of the Electricity Supply Act 1990 ('the Act'). The prosecution case was based on the inspection made by TNB's personnels ('PW3', 'PW4' and 'PW5') and the officer from the Energy Commission ('PW1') on the respondent's meter. There were two substations in
F the respondent's premise known as substation 1 and substation 2. Substation 1 was under the control of TNB whereas substation 2 was under the control of the respondent. Based on the inspection, they detected a bypass done on the armoured cable which purportedly had caused the meter tempering at substation 2. It must be noted that the same type of tempering was found at
G substation 1, nevertheless, the present charge was only against the offence of meter tempering for substation 2. At the trial stage, the learned sessions court judge acquitted and discharged the respondent without the defence being called, hence this appeal. The appellant submitted that the trial judge had erred in law and fact when she failed to consider the ingredients of s 37(3)(e) of the
H Act that had been fulfilled and proven by the appellant. It was further submitted that the trial judge should have taken into account the fact of tempering had happened at the premise under the control of the respondent and also relevant evidence from PW3, PW4 and PW5. The appellant also submitted that the decision not to charge the respondent for the tempering at
I substation 1 was within the discretion of the prosecution and was not a subject matter that could be interfered by the court. On the other hand, the respondent submitted that an adverse inference under s 114(g) of the Evidence Act 1950 ('the EA') should had been drawn against the appellant for not calling the material witness namely the maker of a letter from TNB to the respondent

dated 6 September 2010 ('IDD3'). The respondent also argued that there was CCTV installed at substation 2 however the appellant had carefully avoided this issue during the examinations.

Held, upholding and affirming the decision of the learned trial judge:

(1) The respondent succeeded in rebutting the presumption that it was more likely than not that the bypasses could have been done by a person or persons who had access to both substations and this could not be the respondent who did not have the key to access substation 1. Therefore, the court agreed with the learned trial judge's conclusion, upon the evidence adduced, that no prima facie case had been established against the respondent (see para 11).

(2) It was unfair to the respondent that he had to answer to the charge for what had happened in substation 2 but the TNB was held not to be accountable for the same offence in substation 1 whilst the evidence available was identical. The unjustified conduct of the appellant made it patently clear that it had not acted in good faith where the court was duty bound to supervise for the interests of justice which demands right to equality and to preserve the fundamental of justice system for the criminal proceedings be conducted impartially (see para 15).

(3) Failure of the appellant in calling a very material witness at the prosecution's stage which created a gap would attract the application of adverse inference under s 114(g) of the EA. In the present case, the adverse inference had been invoked against the appellant due to such failure to call the maker of IDD3. To reiterate, the appellant was duty bound to make available the maker of IDD3 and henceforth this non-calling ought to be considered as fatal (see para 21).

(4) The appellant has an ethical duty to disclose the evidence favourable to the respondent. In this case, failure of the appellant to provide justification on the absence of the CCTV footage along with the appellant's witness ('PW6') incomplete investigation which could not confirm the existence or otherwise of such CCTV footage, had indeed put the appellant's case into serious doubts. Consequently, an adverse presumption under s 114(g) of the EA must be invoked against the appellant (see para 27).

[Bahasa Malaysia summary

Responden dipertuduh di mahkamah sesyen untuk kesalahan secara tidak jujur menghalang meter aktaris daripada merekodkan dengan wajar penggunaan tenaga elektrik (pengubahan meter) di bawah s 37(3)(e) Akta Bekalan Elektrik 1990 ('Akta'). Kes pendakwaan adalah berdasarkan pemeriksaan yang dibuat oleh pekerja TNB ('PW3', 'PW4' dan 'PW5') dan pegawai daripada Suruhanjaya Tenaga ('PW1') di meter responden. Terdapat

dua pencawang di premis responden yang dikenali sebagai pencawang 1 dan pencawang 2. Pencawang 1 adalah di bawah kawalan TNB manakala pencawang 2 adalah di bawah kawalan responden. Berdasarkan pemeriksaan, mereka mengesan pintasan dilakukan pada kabel perisai yang kononnya menyebabkan pengubahan meter di pencawang 2. Perlu diambil perhatian bahawa pengubahan yang sama ditemui di pencawang 1, namun begitu, pertuduhan ini hanya terhadap kesalahan mengubah meter untuk pencawang 2. Pada peringkat perbicaraan, hakim mahkamah sesyen yang bijaksana melepaskan dan membebaskan responden tanpa memanggil pembelaan, oleh itu rayuan ini dibuat. Perayu berhujah bahawa hakim perbicaraan terkhilaf dalam undang-undang dan fakta apabila beliau gagal mempertimbangkan inti pati s 37(3)(e) Akta yang telah dipenuhi dan dibuktikan oleh perayu. Ia seterusnya berhujah bahawa hakim perbicaraan sepatutnya mengambil kira fakta pengubahan telah berlaku di premis di bawah kawalan responden dan juga bukti relevan daripada PW3, PW4 dan PW5. Perayu juga berhujah bahawa keputusan untuk tidak mengenakan caj kepada responden untuk pengubahan di pencawang 1 adalah dalam budi bicara pihak pendakwaan dan bukannya satu perkara subjek yang boleh dicampur tangan oleh mahkamah. Sebaliknya, responden berhujah bahawa anggapan berlawanan di bawah s 114(g) Akta Keterangan 1950 ('AK') sepatutnya telah disimpulkan terhadap perayu kerana tidak memanggil saksi utama iaitu penulis surat daripada TNB kepada responden bertarikh 6 September 2010 ('IDD3'). Responden juga berhujah bahawa terdapat CCTV dipasang di pencawang 2 bagaimanapun perayu secara berhati-hati mengelakkan isu ini semasa pemeriksaan.

Diputuskan, menegakkan dan mengesahkan keputusan hakim perbicaraan yang bijaksana:

(1) Responden berjaya menangkis anggapan bahawa adalah lebih berkemungkinan bahawa pintasan boleh dilakukan oleh seseorang atau orang-orang yang mempunyai akses kepada kedua-dua pencawang dan ini bukannya responden yang tidak mempunyai kunci untuk mengakses pencawang 1. Oleh itu, mahkamah bersetuju dengan kesimpulan hakim perbicaraan, berdasarkan keterangan yang dikemukakan, bahawa tiada kes prima facie telah dibuktikan terhadap responden (lihat perenggan 11).

(2) Adalah tidak adil kepada responden bahawa dia terpaksa menjawab kepada pertuduhan untuk apa yang telah berlaku di pencawang 2 tetapi TNB diputuskan tidak bertanggungjawab untuk kesalahan yang sama di pencawang 1 sedangkan bukti yang ada adalah sama. Kelakuan tidak wajar perayu secara terang-terangan menunjukkan bahawa perayu tidak bertindak dengan suci hati di mana mahkamah berkewajipan untuk menyelia agar kepentingan keadilan yang menuntut hak untuk kesaksamaan dan untuk memelihara asas sistem keadilan bagi prosiding jenayah dijalankan secara saksama (lihat perenggan 15).

(3) Kegagalan perayu dalam memanggil saksi yang sangat penting di peringkat pendakwaan yang mencipta jurang akan menarik permohonan anggapan berlawanan di bawah s 114(g) AK. Dalam kes ini, anggapan berlawanan telah digunakan terhadap perayu disebabkan kegagalan untuk memanggil pembuat IDD3. Ditegaskan sekali lagi, perayu berkewajipan untuk memastikan pembuat IDD3 ada dan seterusnya ketidakpanggilan ini seharusnya dianggap sebagai menjejaskan (lihat perenggan 21).

(4) Perayu mempunyai kewajipan etika untuk mendedahkan bukti-bukti yang memihak kepada responden. Dalam kes ini, kegagalan perayu untuk memberikan justifikasi mengenai ketiadaan rakaman CCTV bersama-sama dengan penyiasatan tidak lengkap saksi perayu ('PW6') yang tidak dapat mengesahkan kewujudan atau sebaliknya rakaman CCTV tersebut sememangnya telah meletakkan kes perayu dalam keraguan yang serius. Sehubungan dengan itu, anggapan berlawanan di bawah s 114(g) AK perlu digunakan terhadap perayu (lihat perenggan 27).]

Notes

For cases on dishonesty offences, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1872-1877.

Cases referred to

Abdullah bin Borhan v Ketua Polis Melaka & Anor [2008] 8 MLJ 161, HC (refd)
Borhan bin Hj Daud & Ors v Abd Malek bin Hussin [2010] 6 MLJ 329, CA (refd)
Ghurey Lal v State of UP (2008) 10 SCC 450, SC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (folld)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Oliva [1965] 3 All ER 116, CA (refd)
R v Power [1994] 1 SCR 601, SC (refd)
R v Brown (Winston) [1998] AC 367, HL (refd)
See Kek Chuan v PP [2013] 6 MLJ 885, CA (folld)
Wong Chooi v PP [1967] 2 MLJ 180; [1967] 1 LNS 207 (refd)

Legislation referred to

Criminal Procedure Code s 376
Electricity Supply Act 1990 ss 37(3)(e), 40
Evidence Act 1950 s 114(g)
Federal Consitution art 145(3)

Noor Husnita bt Mohd Radzi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Gopal Sri Ram (CK Lim, David Yii, Moses Susayan and R Kumar with him) (Raja Badrol, Ramli & Azizi) for the respondent.

Zulkifli Bakar J:

BACKGROUND FACTS

[1] The respondent in this case was charged for dishonestly preventing the meter type of actaris with serial No 08000083 from duly recording the output or consumption of electricity (meter tampering), as stated in the charge sheet:

Charge:

> Bahawa kamu pada 28 Julai 2010, jam lebih kurang 3.30 petang di alamat di Lot 5751–5753, Jalan Salak Tinggi, Bandar baru Salak Tinggi, 43900 Salak Tinggi, Selangor telah didapati dengan curang menghalang meter elektrik jenis Actaris nombor siri 08000083 kepunyaan Tenaga Nasional Berhad (TNB) yang dipasang di premis kamu daripada merekodkan dengan sempurnanya penggunahabisan elektrik iaitu dengan membuat pendawaian tambahan pada litar arus S1 setiap fasa-fasa pada armoured cable yang menghubungkan arus dari Current Transformer di switchgear pengguna ke panel meter. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah subseksyen 37(3)(e) Akta Bekalan Elektrik 1990 [Akta 447] dan boleh dihukum di bawah subseksyen 37(3) Akta yang sama.

[2] The prosecution had called six witnesses to give evidence and its brief background facts leading to the present appeal are summarised as follows:

(a) on 7 July 2010, PW3 and PW4 led a team of Tenaga Nasional Bhd ('TNB') personnels to carry out inspection and investigation at the premise of the respondent as usual since the respondent is a customer of electricity of TNB;

(b) there are two substations situated within the respondent premise. Substation 1, even though it is within the premise of the respondent, it is under control by TNB in which the key to enter is always with TNB. Whereas, the respondent only holds the key for substation 2;

(c) at substation 2, the result of the inspection that day showed that there was no tampering from all the parts. However, there was one part that have not been inspected, which was the switch gear requiring a shutdown;

(d) the switch gear part was suspected to be the source of such meter tampering. The consent from Energy Commission had to be obtained prior to shutting down to inspect on the switch gear part;

(e) therefore, on 28 July 2010, PW3, PW4 and PW5 conducted inspection again on the premise of the respondent with other TNB personnels. They had obtained the necessary consent for the shut down and enabled the inspection to be conducted on the switch gear. The officers from Energy Commission led by PW1 were also present;

(f) the team had confirmed that, from the inspection, no evidence of tampering was found. After the reconnection of power supply, the team stayed at the substation 2 and later detected a bypass done on the armoured cable which purportedly had caused the meter tampering;

(g) it is to be noted that, the same tampering was found in substation 1 with an identical bypass in the armoured cable and the key to unlock substation 1 was in the exclusive possession of TNB; and

(h) the defect had then been repaired on the same day. On 30 July 2010, TNB personnels came to the respondent premise to replace the meter in substation 2 with a new one, according to the prosecution, because the meter was required to be used as an exhibit later (refer to p 135, appeal record, Vol 1).

THE APPELLANT'S (PROSECUTION) CONTENTIONS

[3] The appellant submitted that the learned sessions court judge ('trial judge') had erred in law and fact when she failed to consider the ingredients of s 37(3)(e) of the Electricity Supply Act 1990 that had been fulfilled and proven by the appellant (prosecution).

[4] In addition, the appellant advanced the argument that the learned trial judge should have taken into account the fact of tampering had happened at the premise under the control of the respondent and also relevant evidences from PW3, PW4 and PW5.

[5] The appellant further submitted that the decision of the prosecution to not charge the respondent for the tampering at substation 1 was clearly within the discretion of the prosecution under art 145(3) of the Federal Consitution and s 376 of the Criminal Procedure Code as it was not a subject matter that could be interfered by the court (*Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329).

MY FINDINGS

Prima facie case?

[6] At this juncture, this court is of the opinion that what the learned trial judge needs to do at the initial stage was to look whether the evidences of

prosecution, particularly PW4 and PW5 was sufficient to prove the elements of preventing such meter from duly recording the output or consumption of electricity in any dishonest manner, in order for a prima facie case to be made out against the respondent.

[7] The prosecution could also try to invoke the presumption under s 40 of the Electricity Supply Act 1990 to submit the existence of any artificial means which facilitate the dishonest consumption of electricity carried out by the respondent as the occupier of the premise having control of the installation of such meter.

[8] In my considered view, I agree with the learned trial judge where she appreciated that the respondent had successfully rebutted the presumption raised against them on a balance of probabilities (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; *Wong Chooi v Public Prosecutor* [1967] 2 MLJ 180; [1967] 1 LNS 207).

[9] The learned trial judge had correctly directed her mind to this when considering the onus of proof had been shifted to the respondent to rebut such presumption. It is observed from the Federal Court case of *Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 MLJ 267 which has referred to *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (*Yuvaraj*'s case) and held as follows:

> ... where an enactment expressly provides that a particular fact shall be presumed or deemed to exist 'unless the contrary is proved' it is unnecessary for the defendant to prove whatever he has to prove beyond reasonable doubt, *for all that he has to do is to satisfy the court on a balance of probabilities that it is more likely than not that the fact which he seeks to prove or disprove exists or does not exist, as the case may be*. In other words, the burden which lies on him is the same as that which lies on a successful party in civil proceedings. (Emphasis added.)

[10] On the available evidences, this court found that the respondent had pointed out an important fact that is the similar incident of 'bypass' done on the armoured cable found in substation 2 which was under custody of the respondent also existing in substation 1 which was at all material times in the exclusive control of TNB.

(a) the respondent submitted that and which I agree with, with what was found in substation 1 on the same day (as stated in the charge (28 July 2010)), and that had failed to attract the statutory presumption under s 40 of the Electrical Supply Act 1990 (since there was no charge against the TNB in respect of that substation 1), then the charge relating to the identical bypass found in substation 2 should not have been made against the respondent; and

(b) this is because the prosecution had failed to furnish a logic and reasonable explanation as to how the same meter tampering existed in substation 1 where the respondent is unable to have access to it without the key to the said substation. It appears and it is probable that the respondent may not be the maker for such meters tampering at both substations 1 and 2. There is reasonable doubt on this aspect.

[11] It was abundantly clear when the respondent succeeded in rebutting the presumption that it was more likely than not that the bypasses could have been done by a person or persons who had access to both substations and this could not be the respondent who did not have the key to access substation 1. Therefore, this court agrees with the learned trial judge's conclusion, upon the evidences adduced, that no prima facie case had been established against the respondent.

Prosecutorial discretion

[12] There is no denial that the prosecutor has the discretion to decide whether or not to institute the charge against any particular individual. Nevertheless, in my opinion, the prosecutorial discretion must be acted in the interest of fairness to the people and accused person/respondent in the instant case. The court in fact has been reluctant to interfere with the prosecution's discretion. However, the court only intervenes with the exercise of the unfettered prosecution's discretion if there are conspicuous evidences showing that the prosecution had exercised it with improper motive or in bad faith or by mala fide.

[13] I refer to the case of *R v Power* [1994] 1 SCR 601 where it is decided by the Supreme Court of Canada that:

> (12) ... The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to 'second guess' the prosecutor's motives when he or she makes a decision. *Where there is conspicuous evidence of improper motive or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute*. Cases of this nature will be extremely rare. (Emphasis added.)

[14] In the instant case, I found that the prosecution had failed to justify the reason for not issuing a summons to frame the charge against the TNB for the tampering in substation 1 since by invoking s 40 of the Electricity Supply Act 1990 that there is a charge for an offence known to the law against the TNB. It is evidently justice has been miscarried and the excuse of absolute prosecution's

discretion, in my view in this case, is not applicable since there is a great potential for abuse of power could exist in the circumstances.

[15] It is unfair to the respondent that he has to answer to the charge for what had happened in substation 2 but the TNB was held not to be accountable for the same offence in substation 1 whilst the evidence available is identical. The unjustified conduct of the prosecution makes it patently clear that it has not acted in good faith where the court is duty bound to supervise for the interests of justice which demands right to equality and to preserve the fundamental of justice system for the criminal proceedings be conducted impartially.

Maker of IDD3

[16] The respondent submitted that an adverse inference under s 114(g) of the Evidence Act 1950 had been drawn in favour of them for not calling the material witness, namely the maker of letter from TNB to the respondent dated 6 September 2010 ('IDD3'). IDD3 had made no mention of any tampering to the 'armoured cable' and instead it was about the allegation that there was tampering to the 'meter'.

[17] The respondent further argued that the allegation made in IDD3 is consistent with the fact of the action by TNB who did remove the meter on 30 July 2010.

[18] In my observation, I found that PW4 had failed to explain the discrepancy between the allegation as stated in the letter IDD3 and the subject matter of this case (armoured cable — P3). I agree with the respondent that PW4 is not the proper person to give explanation since he was not the maker of IDD3.

[19] To my mind, it is important for the prosecution to call the maker of IDD3 to confirm the subject matter of this case whether it was meter or armoured cable. This is to ensure that the respondent was given a proper notice of the very subject matter of the charge to preserve the rights to a fair trial. In the case of *Abdullah bin Borhan v Ketua Polis Melaka & Anor* [2008] 8 MLJ 161, I agree with the findings of Low Hop Bing J (as he then was) as follows:

> It is trite law that the charge in question must be precisely formulated to include the specific accusation against *the plaintiff who has the right to know and must have notice of the very nature of the charge at the first opportunity, so that the plaintiff is forewarned with clarity and certainty the essential elements or ingredients against him in order to ensure that he can be forearmed in his defence* for the purpose of directing all the evidence exclusively to the specific charge. (Emphasis added.)

[20] In terms of calling of witnesses, it is trite law that the prosecution always

has the discretion to decide which witness to call. Nevertheless, the prosecution has onerous duty to decide in non-calling of a particular witness did not result in leaving any gap in the prosecution's case. I refer to the case of *R v Oliva* [1965] 3 All ER 116 where it was held as follows:

> Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. *The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence*. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness. (Emphasis added.)

[21] Be that as it may, failure of the prosecution in calling a very material witness at the prosecution's stage which created a gap would attract the application of adverse inference under s 114(g) of the Evidence Act 1950. This court has in numerous occasions had said, the prosecution by not calling a particular witness, by way of withholding or suppression of the material evidence and not merely on the account of failure to obtain evidence, is therefore had created a material gap in its case (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492). Applying this principle into the current fact, the adverse inference has been invoked against the prosecution due to such failure to call the maker of IDD3. To reiterate, the prosecution is duty bound to make available the the maker of IDD3 and henceforth this non-calling ought to be considered as fatal.

CCTV FOOTAGE

[22] In the case before this court, another argument advanced by the respondent is that, it was put to the prosecution witnesses that at all material times there was a CCTV installed in substation 2 and thus the prosecution have ample time and opportunity to verify this. The respondent submitted that the prosecution had carefully avoided to this issue during the examinations without asking anything in relating to CCTV.

[23] The concern of this court is whether non-production of the CCTV footage invites the adverse inference under s 114(g) of the Evidence Act 1950 as well, since there was no evidence shown by the prosecution to disprove the existence of the CCTV footage. During cross-examination, PW6 said as follows:

Q: Adakah kamu buat pemerhatian sama ada terdapat CCTV dalam bilik?

A: Tidak.

Q: Saya katakan ada CCTV dalam bilik meter.

A: Saya tidak tahu.

Q: Saya katakan kamu telah sekali lagi overlook very important fact dalam siasatan kamu.

A: Tidak setuju.

Q: Jika CCTV benar-benar wujud adakah CCTV tersebut material dalam siasatan kamu?

A: Mungkin.

(ms 128–129 Rekod Rayuan, Jilid 1)

[24] This court found that the respondent had actually contested the prosecution's failure to provide the relevant CCTV footage to them. The respondent was seeking for a confirmation as to the existence of CCTV footage at the substation 2 and, if there was, then the respondent asked for the explanation of such non-production since the investigating officer was in agreement that the availability of CCTV footage would be a great assistance to the case. I rely on the Court of Appeal case of *See Kek Chuan v Public Prosecutor* [2013] 6 MLJ 885 where His Lordship Abdul Malik Ishak JCA decided:

> [33] *In our judgment, the non-production of the CCTV footage amounts to a withholding or suppression of evidence and if it was produced, it would be unfavourable to the prosecution and, consequently, the adverse presumption under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution.*
>
> [34] It goes without saying that the non-production of the CCTV footage had disadvantaged or prejudiced the defence and the truth of the prosecution's case could not verified. *Indeed in a criminal trial, fairness must be displayed by the prosecution*. And the concepts of a fair trial and fairness have been recognised by our Malaysia Courts in *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119 (FC); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 (FC); *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382; [1994] 1 AMR 113 (SC); *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810 (CA); and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 (FC). (Emphasis added.)

[25] It is well established that fairness is the most important issue for the respondent. As held in the Federal Court case of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, it has encapsulated the idea that fairness requires fair trial which, in turn, needs fair procedure and hence it often requires that the legitimate interests of both the prosecution and the defence are adequately

provided for, upholding the notion of justice in the eye of law.

[26] This court borne in mind to what was said by Lord Hope of Craighead in the case of *R v Brown (Winston)* [1998] AC 367 at p 377:

> The prosecution is not obliged to lead evidence which may undermine the Crown case, *but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence* ... [T]he prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. *Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed*. (Emphasis added.)

[27] Pursuant to the above, in my view, the prosecution has an ethical duty to disclose the evidences favourable to the respondent. In this case, failure of the prosecution to provide justification on the absence of the CCTV footage along with PW6's incomplete investigation which could not confirm the existence or otherwise of such CCTV footage, had indeed put the prosecution's case into serious doubts. Consequently, an adverse presumption under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution.

CONCLUSION

[28] By the prosecution, their failure of production of CCTV footage and non-calling of the material witness had indeed caused prejudicial effect to the respondent's right to a fair trial and hence a benefit of doubt was honoured to the respondent.

[29] Before making any order, this court is mindful of the principle of law, as advanced by the respondent, where an appellant court, in the case of acquittal, must take into account double presumption in favour of the respondent in which firstly presumption of innocent is always available to the respondent in the fundamental principle of criminal jurisprudence and secondly the respondent, having secured his acquittal, must have caused its presumption of his innocence to be further reinforced, reaffirmed and strengthened by the trial court (*Ghurey Lal v State of UP* (2008) 10 SCC 450 at p 476):

(a) the trial court has the advantage of watching the demeanour of the witnesses who had given the evidences, thus it should be slow for this appellate court to interfere unless there is a grave miscarriage of justice has been demonstrated as a result of unsustainable decision made by the learned trial judge. It has to be shown that the learned trial judge had seriously erred in law or facts or both.

[30] For the foregoing reasons, this court found the learned trial judge had correctly addressed her mind as to the required legal proof to acquit and discharge the respondent from the above charge without the defence to be called.

[31] No misdirection from the learned trial judge was found and hence it does not warrant appellate intervention. This court hereby upholds and affirms the decision of the learned trial judge.

Decision of learned trial judge upheld and affirmed.

Reported by Dzulqarnain Ab Fatar